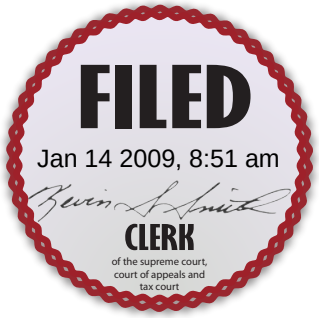

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IN THE
COURT OF APPEALS OF INDIANA

JOHN RAY LANE,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 36A04-0805-CR-273
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE JACKSON CIRCUIT COURT
The Honorable William E. Vance, Judge
Cause No. 36C01-0407-FB-67

January 14, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

VAIDIK, Judge

Case Summary

In this direct appeal, John Ray Lane appeals his conviction for Class B felony manufacturing methamphetamine. Specifically, Lane contends that two of his four consecutive trial attorneys were ineffective for failing to object to a trial date he alleges was set in violation of Indiana Criminal Rule 4. Finding no prejudice, we affirm the judgment of the trial court.

Facts and Procedural History

On March 23, 2004, Lane's wife, Tammy, purchased supplies to manufacture methamphetamine in their mobile home in Brownstown, Indiana, to celebrate Lane's birthday. After the children were asleep in bed, Lane began manufacturing methamphetamine. Lane finished in the morning the next day, and, after the children woke up, the couple began smoking the methamphetamine. That afternoon, Seymour Police Detectives Carl Lamb and Bill Abbott, along with other officers, arrived at the mobile home with a search warrant. When Lane saw the officers, he threw a plastic baggy containing a white powdery substance toward his toolbox a few feet away. Officers later determined the substance in the bag to be methamphetamine after they handcuffed Lane and retrieved the bag. Meanwhile, Tammy ran to the bathroom to begin dumping leftover product into the bathtub. During their search of the home, the officers discovered numerous supplies in the mobile home associated with the manufacture of methamphetamine, and Lane admitted that he had manufactured methamphetamine that day.

The State filed a charging information on July 1, 2004, and Lane was arrested on July 21, 2004.[1] On July 22, 2004, Lane's case was scheduled for a jury trial on May 10, 2005. The trial court appointed Lane's first attorney, who then entered an appearance. On April 19, 2005, Lane, through his first trial attorney, filed for a continuance of his jury trial. The trial court granted the continuance and reset the trial date to December 19, 2005. On April 26, 2005, the trial court reset the trial date to April 4, 2006, due to congestion of the court calendar. Lane's first attorney withdrew, and the trial court appointed a second trial attorney, who entered an appearance. After Lane was released on his own recognizance, his second trial attorney withdrew. On March 17, 2006, the trial court appointed a third attorney, who never entered an appearance. On March 27, 2006, the State filed for a continuance due to congestion of the court calendar, and the trial court reset the trial date to March 8, 2007. On April 4, 2006, Lane, unaware that his case had been continued, appeared for trial but was told the case had been continued. On March 1, 2007, Lane requested counsel, and the trial court appointed his fourth trial attorney, who entered an appearance. On March 6, 2007, Lane, through his fourth trial attorney, filed for a continuance. The trial court granted the continuance and set a new trial date of July 12, 2007. On July 5, 2007, both the State and Lane filed for a

[1] We note that Lane has failed to provide a citation to the record for this date. The CCS lists an entry for July 1, 2004, which provides that the State filed a probable cause affidavit for an arrest warrant and that the warrant was ordered to be issued. The next CCS entry is for July 22, 2004, and it provides that Lane appeared at his initial hearing and pled not guilty. The trial court then set a bond amount, an omnibus date, a pre-trial conference date, and a jury trial date.

At sentencing, Lane's trial counsel argued that the presentence investigation report listed the date of arrest incorrectly, and that the correct date was July 21, 2004. Sent. Tr. p. 2. The State did not contest this date, and we have not been provided a copy of the presentence investigation report on appeal. As such, we will proceed as though the date of arrest was July 21, 2004.

continuance. The trial court again granted the continuance and set the trial date for November 27, 2007.

The trial court held Lane's jury trial on November 27 and 28, 2007. The jury convicted Lane of Class B felony manufacturing methamphetamine.[2] The trial court sentenced Lane to ten years in the Indiana Department of Correction, with three years suspended to probation. Lane now appeals.

Discussion and Decision

Throughout the course of his trial proceedings, the trial court appointed Lane four different trial attorneys. Three of the attorneys either withdrew or did not enter an appearance. The fourth attorney represented Lane at trial. Now on direct appeal, Lane contends he was denied effective assistance of counsel because of the performance of two of the four trial attorneys. Specifically, Lane argues that his third trial attorney was ineffective for failing to enter an appearance, communicate with Lane, or advise him that his trial had been continued. Lane argues that his fourth attorney was ineffective for failing to file a motion for discharge under Indiana Criminal Rule 4(C). Lane argues that but for his trial attorneys' errors, there is a reasonable probability that he would have been discharged. We disagree.

The Sixth Amendment to the United States Constitution guarantees the right of a defendant in a criminal case to the effective assistance of counsel. *Owens v. State*, 750 N.E.2d 403, 408 (Ind. Ct. App. 2001). We review the effectiveness of trial counsel under the two-part test provided by *Strickland v. Washington*, 466 U.S. 668 (1984). *Bieghler v.*

[2] Ind. Code § 35-48-4-1(a).

State, 690 N.E.2d 188, 192-93 (Ind. 1997), *reh'g denied*. A claimant must demonstrate that counsel's performance fell below an objective level of reasonableness based upon prevailing professional norms and that the deficient performance resulted in prejudice. *Strickland*, 466 U.S. at 687-88. "Prejudice occurs when the defendant demonstrates that 'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *Grinstead v. State*, 845 N.E.2d 1027, 1031 (Ind. 2006) (quoting *Strickland*, 466 U.S. at 694). A reasonable probability arises when there is a "probability sufficient to undermine confidence in the outcome." *Id.* (quoting *Strickland*, 466 U.S. at 694). We also note that isolated mistakes, poor strategy, inexperience, and instances of bad judgment do not necessarily constitute deficient performance. *McCary v. State*, 761 N.E.2d 389, 392 (Ind. 2002), *reh'g denied*.

The Sixth Amendment to the United States Constitution also guarantees to each accused person "the right to a speedy and public trial," and Article I, Section 12 to the Indiana Constitution demands that justice shall be administered "speedily, and without delay." The vehicle for implementing these basic rights in Indiana is Criminal Rule 4. *Rhoton v. State*, 575 N.E.2d 1006, 1010 (Ind. Ct. App. 1991), *trans. denied*. Criminal Rule 4(C) provides:

> No person shall be held on recognizance or otherwise to answer a criminal charge for a period in aggregate embracing more than one year from the date the criminal charge against such defendant is filed, or from the date of his arrest on such charge, whichever is later; except where a continuance was had on his motion, or the delay was caused by his act, or where there was not sufficient time to try him during such period because of congestion of the court calendar; provided, however, that in the last-mentioned circumstance, the prosecuting attorney shall file a timely motion for continuance as under subdivision (A) of this rule. Provided further, that a trial court may take note of congestion or an emergency without the

> necessity of a motion, and upon so finding may order a continuance. Any continuance granted due to a congested calendar or emergency shall be reduced to an order, which order shall also set the case for trial within a reasonable time. Any defendant so held shall, on motion, be discharged.

The purpose of Criminal Rule 4(C) is to create early trials, not to discharge defendants. *State v. Delph*, 875 N.E.2d 416, 419 (Ind. Ct. App. 2007), *reh'g denied*, *trans. denied*. Regarding the timeliness of the State's motion for continuance due to court congestion, Criminal Rule 4(A) provides, in relevant part, that

> the prosecuting attorney shall make such statement in a motion for continuance not later than ten (10) days prior to the date set for trial, or if such motion is filed less than ten (10) days prior to trial, the prosecuting attorney shall show additionally that the delay in filing the motion was not the fault of the prosecutor.

Criminal Rule 4(F) provides in part that "[w]hen a continuance is had on motion of the defendant, or delay in trial is caused by his act, any time limitation contained in this rule shall be extended by the amount of the resulting period of such delay caused thereby."

Thus, the rule provides, with certain exceptions, for the discharge of a defendant held to answer for a criminal charge for a period in aggregate of more than one year. *See State v. McGuire*, 754 N.E.2d 639, 642 (Ind. Ct. App. 2001), *trans. denied*. Because the State has an affirmative duty to try the defendant within one year, the defendant is under no obligation to remind the State of its duty. *Rhoton*, 575 N.E.2d at 1010. However, a defendant has a duty to alert the court when the defendant is aware or reasonably should be presumed aware that a trial date has been scheduled beyond the one-year limit set forth in the rule. *Brown v. State*, 725 N.E.2d 823, 825 (Ind. 2000). If a defendant remains silent while the court schedules a trial beyond the allowable date, then his action estops him from enforcing any right of discharge. *Rhoton*, 575 N.E.2d at 1010 (citing

Utterback v. State, 261 Ind. 685, 310 N.E.2d 552 (1974)). But a defendant has no duty to object to the setting of a belated trial date when the setting of the date occurs after the time expires such that the court cannot reset the trial within the Rule 4(C) period. *Young v. State*, 765 N.E.2d 673, 679 (Ind. Ct. App. 2002). Instead, the defendant need move only for discharge. *Id.*

The time for trial is extended for delays caused by the defendant's own acts or continuances had on the defendant's motion. *Cook v. State*, 810 N.E.2d 1064, 1066-67 (Ind. 2004). Thus, if a defendant "seeks or acquiesces in any delay which results in a later trial date, the time limitations of the rule are also extended by the length of those delays." *Wooley v. State*, 716 N.E.2d 919, 924 (Ind. 1999), *reh'g denied*. Furthermore, if a defendant's actions cause the withdrawal of the defendant's attorney, the defendant is charged with the delay. *Isaacs v. State*, 673 N.E.2d 757, 763 (Ind. 1996). However, if the State fails to file a motion for continuance due to congestion of the court calendar ten days before the date set for trial, any resulting delay is not chargeable to the defendant unless the State makes a showing that the delay in filing was not the fault of the prosecutor. *Marshall v. State*, 759 N.E.2d 665, 671 (Ind. Ct. App. 2001). As for the trial court, if the trial court continues a criminal case due to congestion on the court calendar but fails to issue an order "taking note" of court congestion, the delay is not chargeable to the defendant. *Young*, 765 N.E.2d at 677.

Turning to Lane's case, the record reveals that the charging information was filed on July 1, 2004, and Lane was later arrested on July 21, 2004. Thus, at this point, pursuant to Criminal Rule 4, the State was required to bring Lane to trial by July 21,

2005. On July 22, 2004, Lane's case was properly scheduled for a jury trial on May 10, 2005. Lane was appointed his first attorney, who entered an appearance. On April 19, 2005, Lane, through his first trial attorney, filed for continuance of his jury trial. The trial court granted the continuance and reset the trial date to December 19, 2005. This delay is attributable to Lane and extends the Rule 4(C) time period 244 days. On April 26, 2005, the trial court reset the trial date to April 4, 2006, due to congestion of the court calendar. This continuance extends the Rule 4(C) time period 106 days. *Bates v. State*, 520 N.E.2d 129, 131-32 (Ind. Ct. App. 1988), *reh'g denied*, *trans. denied*. We do not charge Lane twice for those days of delay that overlap. *See Henderson v. State*, 647 N.E.2d 7, 13 (Ind. Ct. App. 1995), *reh'g denied*, *trans. denied*. At this point, 350 days of delay are attributable to Lane and the State was required to bring Lane to trial by July 6, 2006.

Lane's first attorney then withdrew, and Lane was appointed a second trial attorney, who entered an appearance. After Lane was released on his own recognizance, his second trial attorney withdrew. Because there is no evidence on the record that Lane is responsible for these withdrawals, any delay is not attributable to him. On March 17, 2006, the trial court appointed a third attorney, who never entered an appearance. On March 27, 2006, the State filed for a continuance of the April 4 trial date due to congestion of the court calendar, and the trial court reset the trial date to March 8, 2007. However, because the State filed this motion only eight days before trial instead of the requisite ten and the trial court did not enter an order of its own finding court congestion, the delay is not attributable to Lane. It is at this point that Lane could have objected under Criminal Rule 4(C), but he was not entitled to automatic discharge because the trial

court could either move the trial date to within the Rule 4(C) period or take note of the congestion of its calendar by written order.

Court correspondence regarding the continuance was sent to Lane's third attorney, whom Lane asserts never informed him about the new trial date or communicated with him at all. Appellant's Br. p. 9. However, Lane has presented no evidence in the record that he made any contact, initial or otherwise, with his court-appointed attorney.[3] On April 4, 2006, Lane, unaware that his case had been continued, appeared for trial but was told of the continuance. At this point, Lane reasonably should have been aware that his trial date was set for a time outside the Rule 4(C) period, triggering his duty to object so that the court could either reschedule to a date within the Rule 4(C) period or take notice of congestion on the court calendar with a written order and thereby extend the Rule 4(C) period. Lane also at this point knew that he had never communicated with his court-appointed attorney, and he should have alerted the trial court to this issue.

Instead, Lane was silent. Not until March 1, 2007, nearly a year later and seven days before his scheduled jury trial, did Lane request counsel. The trial court appointed his fourth trial attorney, who entered an appearance. On March 6, 2007, Lane, through

[3] We note that the use of the *Davis*/*Hatton* procedure, outlined in Indiana Appellate Rule 37, is encouraged to develop an evidentiary record for issues that with reasonable diligence could not have been discovered before the time for filing a motion to correct error or a notice of appeal has passed. *Schlabach v. State*, 842 N.E.2d 411, 418 (Ind. Ct. App. 2006), *trans. denied*. Any party may request that the appeal be suspended or terminated so that a more thorough record may be developed through post-conviction proceedings. *D.D.K. v. State*, 750 N.E.2d 885, 890 (Ind. Ct. App. 2001). The procedure is especially appropriate for cases like these, where a defendant is arguing ineffective assistance of counsel, because they may require a certain level of fact-finding. *See Lee v. State*, 694 N.E.2d 719, 721 n.6 (Ind. 1998). Based on the totality of the evidence before us, we conclude that Lane's claims regarding the deficiency of counsels' performance rest on factual determinations and further evidentiary development that can only be reached by the trial court. *See Slusher v. State*, 823 N.E.2d 1219, 1223-24 (Ind. Ct. App. 2005). As a result, Lane has failed on appeal to show, based on evidence in the record, that his trial attorneys' performance was deficient. Because we decide Lane's case on the prejudice prong of the *Strickland* test, we need not address the deficient performance prong further.

his fourth trial attorney, filed for a continuance. The trial court granted the continuance and set a new trial date for July 12, 2007. On July 5, 2007, the State and Lane filed for continuance. The trial court again granted a continuance and set the trial date for November 27, 2007. Lane proceeded to trial on that date.

Lane has not met the second prong of the *Strickland* test, as he was not prejudiced as a result of his trial attorneys' failure to raise a timely Criminal Rule 4(C) objection. Lane had the opportunity to make a timely objection between March 27 and July 6, 2006. If trial counsel had raised a timely objection on Criminal Rule 4(C) grounds, we have no doubt that the objection would have been sustained by the trial court. *See Heyward v. State*, 769 N.E.2d 215, 222 (Ind. Ct. App. 2002); *Rhoton*, 575 N.E.2d at 1011. That being the case, the trial court would have either rescheduled the trial date within the one-year limit or exercised its discretion, based upon its crowded docket, to continue the trial date beyond that time. The latter course of action seems most likely, as the State noted in its Motion for Continuance that another jury trial was already set on April 4, 2006, as a first choice setting and yet another trial was set on that date as a second choice setting. Appellant's App. p. 6. Either way, the trial would have been rescheduled in accordance with the rule and Lane would ultimately have been convicted. By failing to object during the relevant time period and waiting until almost a year later to alert the trial court, Lane acquiesced in the continuance of the court date. Thus, we cannot say that, but for trial counsels' failure to raise a timely Criminal Rule 4(C) objection, the outcome would have been different. Accordingly, we do not find that trial counsel was ineffective on this issue.

Affirmed.

RILEY, J., and DARDEN, J., concur.